

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

LEONARD SCOTT,

No. C 09-2789 SI (pr)

Petitioner,

**ORDER OF DISMISSAL**

v.

MATTHEW CATES, Secretary of  
Corrections,

Respondent.

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**INTRODUCTION**

Leonard Scott, a pro se prisoner, filed a petition for writ of habeas corpus to challenge his 2000 conviction in Santa Clara County Superior Court. Respondent has moved to dismiss the petition as untimely. For the reasons discussed below, the court finds the petition to be barred by the statute of limitations and dismisses it.

**BACKGROUND**

Following a jury trial in Santa Clara County Superior Court, Scott was convicted of making a false financial statement, false personation, and misdemeanor filing false documents with the California Department of Motor Vehicles. The trial court found that Scott had suffered three prior convictions for purposes of the Three Strikes Law. On January 3, 2000, Scott was sentenced to two concurrent terms of 25 years to life in prison plus a concurrent term on the misdemeanor.

He appealed. The California Court of Appeal modified the sentence to stay all but one

1 of the concurrent 25-to-life terms, and otherwise affirmed the conviction. On November 20,  
2 2001, the California Supreme Court denied Scott's petition for review.

3 Scott also filed a habeas petition in the California County Superior Court on or about  
4 February 25, 2009. That petition was denied on April 6, 2009.

5 He then filed his federal petition for writ of habeas corpus. The petition has a proof of  
6 service stating that it was mailed to the court on June 15, 2009. The petition was stamped "filed"  
7 on June 24, 2009. As a prisoner proceeding pro se, Scott receives the benefit of the prisoner  
8 mailbox rule, which deems most documents filed when they are given to prison officials to mail  
9 to the court. See Stillman v. LaMarque, 319 F.3d 1199, 1201 (9th Cir. 2003). The petition is  
10 deemed to have been filed on June 15, 2009, the date of the proof of service.

## 11 12 DISCUSSION

13 Petitions filed by prisoners challenging non-capital state convictions or sentences must  
14 be filed within one year of the latest of the date on which: (1) the judgment became final after  
15 the conclusion of direct review or the time has passed for seeking direct review; (2) an  
16 impediment to filing an application created by unconstitutional state action was removed, if such  
17 action prevented petitioner from filing; (3) the constitutional right asserted was recognized by  
18 the Supreme Court, if the right was newly recognized by the Supreme Court and made  
19 retroactive to cases on collateral review; or (4) the factual predicate of the claim could have been  
20 discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1).

21 Here, the judgment became final and the limitations period began on February 19, 2002,  
22 90 days after the California Supreme Court denied Scott's petition for review on November 20,  
23 2001. See Bowen v. Roe, 188 F.3d 1157, 1159 (9th Cir. 1999) (direct review period includes  
24 the period during which the petitioner could have sought further direct review, regardless of  
25 whether he did so). The presumptive deadline for Scott to file his federal petition was February  
26 19, 2003. He missed that deadline by more than six years, so unless he qualifies for a lot of  
27 statutory or equitable tolling, the petition is untimely.

1 The one-year limitations period may be tolled for the "time during which a properly filed  
2 application for State post-conviction or other collateral review with respect to the pertinent  
3 judgment or claim is pending." 28 U.S.C. § 2244(d)(2). Statutory tolling is not appropriate here  
4 because Scott did not file his first state habeas petition until February 2009, many years after the  
5 limitations period had already ended. Once the limitations period expired it could not be  
6 revived. See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) ("section 2244(d) does  
7 not permit the reinitiation of the limitations period that has ended before the state petition was  
8 filed," even if the state petition was timely filed).<sup>1</sup> Scott did send a request to the superior court  
9 in or about early 2007 in which he asked for transcripts from a 1979 hearing, see Petition, Exh.  
10 D, but this effort does not result in any statutory tolling because it was not a "properly filed  
11 application" under § 2244(d)(2) and because it occurred long after the limitations period had  
12 expired.

13 The one-year limitations period can be equitably tolled because § 2244(d) is a statute of  
14 limitations and not a jurisdictional bar. Calderon v. United States District Court (Beeler), 128  
15 F.3d 1283, 1288 (9th Cir. 1997), overruled in part on other grounds by Calderon v. United States  
16 District Court (Kelly), 163 F.3d 530 (9th Cir. 1998) (en banc). Two standards have been  
17 articulated for determining whether equitable tolling is appropriate. The standard that has long  
18 been used in the Ninth Circuit is that equitable tolling will not be available in most cases because  
19 extensions of time should be granted only if "extraordinary circumstances beyond a prisoner's  
20 control make it impossible to file a petition on time." Beeler, 128 F.3d at 1288 (citation and  
21 internal quotation marks omitted). The Supreme Court articulated the standard differently, and  
22 stated that "a litigant seeking equitable tolling bears the burden of establishing two elements:  
23 (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance  
24 stood in his way." Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005) (petitioner's lack of diligence  
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26 <sup>1</sup>If the limitations period is equitably tolled for enough of the period between the  
27 conclusion of direct review and the filing of the state habeas petitions to bridge that gap,  
28 statutory tolling might be in order for state habeas petitions filed more than a year after the  
conclusion of direct review, but that is not the case here because the limitations period will not  
be equitably tolled.

1 in filing timely state and federal petitions precluded equitable tolling); Rasberry v. Garcia, 448  
2 F.3d 1150, 1153 (9th Cir. 2006) (quoting Pace). The Ninth Circuit has not settled on a single  
3 consistent standard. See Harris v. Carter, 515 F.3d 1051, 1055 (9th Cir.), cert. denied, 129 S.  
4 Ct. 397 (2008) (declining to decide whether Pace standard differs from Beeler standard).

5 Under either articulation of the test, the petitioner bears the burden of showing that  
6 equitable tolling is warranted in his case. See Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir.  
7 2002); Pace, 544 U.S. at 418. The petitioner also must show that the extraordinary  
8 circumstances "were the cause of his untimeliness." Spitsyn v. Moore, 345 F.3d 796, 799 (9th  
9 Cir. 2003). Spitsyn's mention of causation is important because it shows that equitable tolling  
10 often is not susceptible to a simple yes/no kind of inquiry, but instead requires the court to  
11 determine whether equitable tolling is allowed for the circumstance and, if so, how much time  
12 should be tolled for the circumstance. An acceptable reason for some delay doesn't necessarily  
13 mean that all delay will be excused.

14 Scott fails to show that he is entitled to any, let alone six years of equitable tolling of the  
15 limitations period. He did not file an opposition to the motion to dismiss, so the court has looked  
16 to his other filings for possible bases for equitable tolling.

17 In the attachments to his petition, he seems to assert that he has newly discovered  
18 evidence. See Petition, Exh. H. At page 6 of his habeas petition to the Santa Clara County  
19 Superior Court, Scott he explained his delay with a statement that he had reviewed his prison file  
20 on December 10, 2008 and had seen the court transcripts from his earlier plea bargains from the  
21 prior convictions used for sentence enhancement purposes. In a declaration attached to that  
22 same petition, he explained that he just learned that the "district attorney and the public attorney  
23 knew that petitioners (sic) priors were under a plea bargain and the ct. transcripts reflected the  
24 fact." Petition, Exh. H at Scott Decl. The Santa Clara County Superior Court rejected the  
25 petition as an effort to do a second appeal, explaining that the sentence challenge had been raised  
26 and rejected on direct appeal. Scott has not offered any explanation as to why he would have  
27 been unaware until 2008 that his earlier convictions had been the product of guilty pleas, nor has  
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1 he shown any diligence in obtaining this information – the significance of which is unclear –  
2 until 2008. Scott has not shown that the unidentified newly discovered evidence warrants  
3 equitable tolling of the limitations period.

4 After respondent filed his motion to dismiss, Scott filed two letters in which he asked for  
5 a stay and abeyance. See Docket # 13, # 14. In those letters, he presented evidence that he  
6 suffered some physical injury in an altercation in January 2010, and consequently was put in  
7 administrative segregation where there was limited law library access. These events are too late  
8 to provide any reason to equitably toll the limitations period, which had expired more than six  
9 years before these events took place. Scott has not shown that any equitable tolling is warranted.  
10 The petition was filed more than six years too late. The petition must be dismissed.

11 Scott's request for a stay and abeyance is DENIED. (Docket # 13, # 14.) The usual  
12 reason for a stay and abeyance is to exhaust unexhausted claims in state court, but Scott has not  
13 identified any new claims he would be pursuing in state court if this action was stayed, nor has  
14 explained his extreme delay in presenting any such claim. The events that occurred in January  
15 2010 would not be relevant to any claim with regard to his 2000 conviction and sentence. There  
16 is no reason for a stay and abeyance because the petition is already too late, and staying this  
17 action will not overcome the untimeliness problem.

18 In the second letter in which he requested a stay and abeyance, Scott also requested  
19 appointment of counsel. The request for appointment of counsel is DENIED for the same  
20 reasons stated in the order denying his first request for appointment of counsel. When the court  
21 denied the first request for appointment of counsel three months before the second request was  
22 made, the court reminded petitioner of his deadline to file his opposition to the motion to  
23 dismiss, so it is not reasonable to believe that Scott was waiting for a ruling on his second  
24 request (filed two months after his opposition was due) before filing his opposition to the motion  
25 to dismiss.

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**CONCLUSION**


Respondent's motion to dismiss is GRANTED. (Docket # 8.) The petition for writ of habeas corpus is dismissed because it was not filed before the expiration of the limitations period in 28 U.S.C. § 2244(d)(1). A certificate of appealability will not issue because this is not a case in which "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Petitioner's second motion for appointment of counsel is DENIED. (Docket # 14.)

The clerk will close the file.

IT IS SO ORDERED.

DATED: May 3, 2010

  
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SUSAN ILLSTON  
United States District Judge